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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ERIC ALAN MULKEY, Petitioner.	2 CA-CR 2007-0315-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR94000336

Honorable Stephen M. Desens, Judge

REVIEW GRANTED; RELIEF DENIED

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By Thomas E. Higgins
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial in 1995, petitioner Eric Alan Mulkey was convicted of first-degree murder, robbery, and theft by control. The trial court sentenced him to

concurrent prison terms of life, 10.5 years, and 1.5 years. This court affirmed his convictions and sentences on appeal. *State v. Mulkey*, No. 2 CA-CR 95-0271 (memorandum decision filed Jan. 28, 1999). In 1999, Mulkey filed a notice and petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied relief, and this court denied review. *State v. Mulkey*, No. 2 CA-CR 00-0129 (memorandum decision filed Aug. 24, 2000). Mulkey then filed a petition for a writ of habeas corpus in federal district court. That petition was denied in 2002, as was Mulkey's request for a certificate of appealability of that order. Mulkey filed another petition for post-conviction relief in February 2003. He now challenges the trial court's dismissal of that petition.[1] Although we grant review, we deny relief.

¶2 We review a trial court's denial of post-conviction relief for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). In the petition Mulkey filed below, he raised claims of ineffective assistance of both trial and appellate counsel. He alleged trial counsel had been ineffective by failing to reasonably investigate his case, and appellate counsel had been ineffective by failing to raise trial counsel's

[1]In this petition for review, Mulkey acknowledges the trial court denied an earlier petition for post-conviction relief in April 1997. Mulkey apparently did not seek this court's review of that ruling. We note that counsel's first supplemental memorandum in support of the current Rule 32 petition states that Mulkey "filed his first Petition for Post-Conviction [Relief] on or about March 26, 1997." Counsel then apparently confuses the first petition with the one filed in 1999, stating that the trial court denied the 1997 petition in January 2000 and that this court subsequently denied review on August 24, 2000. Nonetheless, whether this is Mulkey's second or third Rule 32 proceeding does not affect our analysis here.

performance on direct appeal and by failing to preserve issues for federal review. He also alleged appellate counsel had been ineffective for "fail[ing] to advise [Mulkey] of his right to appeal the denial of his federal habeas corpus petition."[2]

¶3 The trial court found Mulkey's claim involving trial counsel was precluded because he had failed to raise it in his previous Rule 32 proceedings. With respect to Mulkey's claims of ineffective assistance of appellate counsel, the court, found it had not been "timely filed" but added that, "[E]ven setting aside the issue of timeliness, [Mulkey] has failed to meet the two prong test of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." The court then summarily dismissed the petition, finding there were "no remaining claims which present[ed] a material issue of fact or law which would entitle [Mulkey] to relief pursuant to Rule 32, and no purpose would be served by any further proceedings."

¶4 When "ineffective assistance of counsel claims are raised, or could have been raised, in a [previous] Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded." *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (emphasis removed); *see also State v. Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d 945, 952 (App. 2007) (same). Thus, the trial court did not abuse its discretion in finding precluded Mulkey's claim of ineffective assistance of trial counsel. Mulkey's claim of ineffective assistance of appellate counsel was also precluded because he

[2]Evidently, the same counsel who had been appointed to represent Mulkey on direct appeal had also been retained by Mulkey's family to represent him in the federal habeas proceedings.

could have raised it in his 1999 petition for post-conviction relief, which was filed well after the decision in his direct appeal.

¶5 Mulkey asserted in his notice of post-conviction relief that his claims fell under Rule 32.1(d), (e), (f), (g), or (h), Ariz. R. Crim. P. Such claims are excepted from the rule of preclusion under Rule 32.2(b). However, that rule also provides:

> When a claim under Rules 32.1(d), (e), (f), (g), and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice . . . must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.

Ariz. R. Crim. P. 32.2(b). The rule further provides that, "[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed." *Id*. Mulkey's notice suggested appellate counsel's deficiencies had been "newly discovered" after the dismissal of his habeas corpus petition, but he did not explain why they had not been readily discernable at the conclusion of his appeal, nor did he explain the nearly four-month delay between the dismissal of his federal petition and the filing of his notice of post-conviction relief.

¶6 But even assuming Mulkey's claim of ineffective assistance of appellate counsel was not precluded, the trial court did not abuse its discretion in concluding Mulkey had also failed to meet his burden of showing appellate counsel had performed below a reasonable standard of competence and that counsel's performance had caused him

prejudice. *See Strickland*, 466 U.S. at 690 (requiring defendant claiming ineffective assistance of counsel to show both deficient performance and prejudice); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (same). "A strong presumption exists that appellate counsel provided effective assistance. Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal. As a general rule, '[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.'" *State v. Bennett*, 213 Ariz. 562, ¶ 22, 146 P.3d 63, 68 (2006) (citations omitted), *quoting State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶7 The only issues Mulkey specifically identifies in his petition for review that appellate counsel failed to raise on appeal are the effectiveness of trial counsel and Mulkey's "right to a jury trial on all facts that increased his sentence." As early as 1989, our supreme court "recommended that ineffectiveness claims be raised in Rule 32 proceedings" rather than on direct appeal. *Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d at 526; *see also State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). But in *Spreitz*, the supreme court unequivocally held that "[a]ny such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit." *Id.* ¶ 9. Thus, appellate counsel's failure to raise the effectiveness of trial counsel on appeal did not fall below objective standards of reasonableness. To the extent Mulkey contends appellate counsel was ineffective for failing to raise a claim under *Blakely v. Washington*, 542 U.S. 296 (2004), that decision was not issued until years after Mulkey's appeal was final, and it is not retroactive. *See State v.*

Febles, 210 Ariz. 589, ¶ 7, 115 P.3d 629, 632 (App. 2005). Moreover, *Blakely* is not implicated by a trial court's imposition of a presumptive sentence. *See State v. Ramsey*, 211 Ariz. 529, ¶ 45, 124 P.3d 756, 770 (App. 2005). Mulkey concedes in his petition for review that he received presumptive prison terms for the robbery and theft convictions. And although he characterizes his sentence for the murder conviction as an "'aggravated' term," it is not. *Cf. State v. Fell*, 210 Ariz. 554, ¶¶ 5, 19, 115 P.3d 594, 596, 600 (2005) (for defendant convicted of first-degree murder, "Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed").

¶8 Finally, Mulkey's claim that appellate counsel provided ineffective assistance during her representation of him in federal court is not cognizable under Rule 32.1. Thus, the trial court did not abuse its discretion in summarily dismissing Mulkey's petition for post-conviction relief. Although we grant review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge